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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 DANASIRI RATNAWEERA,

12 Petitioner,

13 v.

14 ATTORNEY GENERAL, et al.,

15 Respondents.
16

) Case No. CV 08-3926 JST(JC)

) ~~(PROPOSED)~~

) ORDER ACCEPTING FINDINGS,
) CONCLUSIONS, AND
) RECOMMENDATIONS OF
) UNITED STATES MAGISTRATE
) JUDGE

17 Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for Writ of
18 Habeas Corpus by a Person in State Custody (the “Petition”), respondents’ Motion
19 to Dismiss and documents submitted in support of and in opposition thereto, and
20 all of the records herein, including the attached Report and Recommendation of
21 United States Magistrate Judge and petitioner’s objections and supplemental
22 objections to the Report and Recommendation that petitioner filed on June 23,
23 2011, and August 1, 2011, respectively (the “Objections”). The Court has further
24 made a *de novo* determination of those portions of the Report and
25 Recommendation to which objection is made.¹
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28 ¹To the extent the Objections raise new evidence and arguments, this Court, in an
exercise of its discretion, declines to consider them. See United States v. Howell, 231 F.3d 615,
621 (9th Cir. 2000), cert. denied, 534 U.S. 831 (2001).

1 Petitioner has objected to the Report and Recommendation arguing, *inter*
 2 *alia*, that any procedural shortcomings should be excused because petitioner
 3 assertedly is actually innocent of the crimes for which he was convicted.
 4 While actual innocence may be a gateway to review claims that otherwise are
 5 procedurally barred,² Schlup v. Delo, 513 U.S. 298, 324 (1995), the Report and
 6 Recommendation does not recommend that the Court decline to reach the merits of
 7 petitioner's claims based upon a procedural default. See Report and
 8 Recommendation at 11, n. 10. In any event, petitioner has not met his burden on
 9 any claim of actual innocence by showing "new reliable evidence. . . that was not
 10 presented at trial." Schlup v. Delo, 513 U.S. at 324; see also House v. Bell, 547
 11 U.S. 518, 537 (2006) (quoting Schlup standard). Petitioner must show "that it is
 12 more likely than not that no reasonable juror would have found petitioner guilty
 13 beyond a reasonable doubt." Schlup v. Delo, 513 U.S. at 327. Petitioner's
 14 attempts to recast the evidence presented at trial do not meet the Schlup standard.
 15 To the extent petitioner is asserting that the Court should consider the merits of
 16 petitioner's claims because petitioner assertedly is actually innocent, he must first
 17 attempt to exhaust his claims with the state courts. 28 U.S.C. § 2254(b)(1).

18 Petitioner also argues, incorrectly, that respondents' failure to file any
 19 response to the Objections amounts to acquiescence to the Objections. See
 20 August 1, 2011 Objections at 61. The filing of a response to objections is
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22 ² The United States Supreme Court has expressly left open the question of whether a
 23 freestanding claim of actual innocence is cognizable on federal habeas review. See District
 24 Attorney's Office v. Osborne ("Osborne"), 129 S. Ct. 2308, 2321 (2009) (whether federal
 25 constitutional right to be released upon proof of "actual innocence" exists "is an open question");
 26 House v. Bell, 547 U.S. 518, 554-55 (2006) (declining to resolve whether freestanding actual
 27 innocence claim can be maintained); Herrera v. Collins, 506 U.S. 390, 417 (1993) (assuming
 28 without deciding "that in a capital case a truly persuasive demonstration of 'actual innocence'
 made after trial would render the execution of a defendant unconstitutional, and warrant federal
 habeas relief if there were no state avenue open to process such a claim").

1 permissive, not mandatory. It would not be appropriate to infer from the lack of
2 such a response that respondents concur with the Objections.

3 Based upon the Court's review, the Court concurs with and accepts the
4 findings, conclusions and recommendations of the United States Magistrate Judge
5 and overrules the Objections.

6 IT IS ORDERED that: (1) petitioner's restitution-related claims –
7 Grounds 11, 13, 16 and 17 – are dismissed as they are not cognizable on federal
8 habeas review; (2) the Motion to Dismiss is granted to the extent it seeks dismissal
9 of petitioner's remaining claims – Grounds 3-10, 12, 14-15 and 18-20 – based
10 upon the lack of exhaustion; and (3) Judgment be entered denying and dismissing
11 the Petition without prejudice.

12 IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the
13 accompanying Judgment and the United States Magistrate Judge's Report and
14 Recommendation on petitioner and on counsel for respondents.

15 IT IS SO ORDERED.

16 DATED: 12.05.11

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19 HONORABLE JOSEPHINE STATON TUCKER
20 UNITED STATES DISTRICT JUDGE
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